ZAINUDDIN MUHAMMAD

v.

ATSCO LTD & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
KC VOHRAH JCA
[CIVIL APPEAL NO: W-02-840-2000]
6 JULY 2001

CIVIL PROCEDURE: *Contempt of court - Breach of court order - Imprisonment, whether appropriate - Whether warning sufficient - Nature of breach - Mitigating factors - Contemnor's character, age and health*

This was the appellant's appeal against his conviction for contempt of court and the sentence of three months' imprisonment imposed. The High Court had earlier found the appellant guilty for failing to furnish a full account of all his assets as required by an order of the court.

Held:
Per Gopal Sri Ram JCA

[1] Although the appellant had prevaricated and was late, he did eventually render a true account of all his assets. The justice of the case would not be met by sending the appellant to prison. The sentence of three months' imprisonment meted out by the High Court was therefore manifestly excessive.

Per KC Vohrah JCA

[1] The breach committed by the appellant was a once-and-for-all breach of an order of court. Also relevant was the fact that the ailing appellant who was now 68 years old was formerly a high government official with an unblemished record. Hence the most appropriate punishment would be a warning coupled with a punitive order for costs.

[Conviction upheld; sentence of imprisonment set aside and appellant discharged with a warning.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan perayu terhadap pensabitan beliau kerana penghinaan mahkamah dan hukuman tiga bulan pemenjaraan yang dikenakan. Mahkamah Tinggi telah pada awalnya mendapati perayu bersalah kerana gagal untuk memberikan akaun sepenuhnya mengenai kesemua aset-aset beliau seperti yang dikehendaki oleh satu perintah mahkamah.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Walaupun perayu telah berdolak-dalih dan lewat, beliau telah akhirnya memberikan akaun sepenuhnya mengenai kesemua aset-aset beliau. Keadilan kes tidak akan dapat dipenuhi dengan menghantar perayu ke penjara. Hukuman tiga bulan pemenjaraan yang dijatuhkan oleh Mahkamah Tinggi adalah dengan itu nyata keterlaluan.

Oleh KC Vohrah HMR

[1] Keingkaran yang dilakukan oleh perayu adalah suatu keingkaran "once-and-for-all" terhadap perintah mahkamah. Perkara yang juga relevan adalah fakta bahawa perayu yang sakit itu yang kini berumur 68 tahun adalah dahulunya seorang pegawai tinggi kerajaan dengan rekod pekerjaan yang tidak tercemar. Oleh itu hukuman yang paling wajar adalah satu amaran beserta dengan satu perintah punitif bagi kos.

[Sabitan dipertahankan; hukuman pemenjaraan diketepikan dan perayu dilepaskan dengan satu amaran.]

Case(s) referred to:
Danchevsky v. Danchevsky [1975] Fam 17 ***(refd)***
Goff v. Goff [1989] 1 FLR 436 CA ***(refd)***
Lightfoot v. Lightfoot [1989] 1 FLR 414 ***(refd)***
R v. Border Television Ltd [1978] 68 Cr App Rep 375 ***(refd)***
R v. Newcastle Chronicle & Journal Ltd [1978] 68 Cr App Rep 375 ***(refd)***

For the appellant - Cecil Abraham (K Kirubakaran, G Rajasingam & Paul Chua); M/s Kiru & Yong
For the respondents - K Anantham (K Gowri); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D5-596-1999]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

This appeal concerns a very short point. It is of no great moment. The appellant is 68 years old. The High Court found him guilty of offending an order of court. It sentenced him to three months' imprisonment. The appellant appealed to us. We heard his appeal on 16 May 2001. We upheld his conviction. But we set aside his sentence. Instead of a term of imprisonment, we discharged him with a warning.

The order in question was made on 12 March 1999. It required the appellant within seven days from the service of the order to render a full and true account of all his assets. There is no dispute that the appellant did not obey the order within the time therein limited. He was 40 days late. That is because he prevaricated. But he eventually did render a true account of all his assets. In any event the order of 12 March 1999 appears to have been superseded by a consent order made on 24 August 2000 which allowed the appellant a further seven days from the date of this second order to deliver his affidavit of assets.

Now, Mr. Anantham of counsel for the respondents submitted that the sentence of three months was reasonable because there was contumelious disregard of the first order of 12 March 1999. That may have been the case. But counsel overlooks the second consent order which extended time. So in my view the time within which the appellant was required to declare his assets was no longer of the essence. What was of the essence was whether he did in fact deliver an affidavit of his assets. And of that there is no doubt. He did.

Mr. Anantham then complains about the general conduct of the appellant. The way in which he moved his money about despite there being an injunction operating against him. Now there may be a great deal to be said about these matters. But I do not think that we ought to be concerned with it. The gravamen of the charge against the appellant appears in the statutory statement lodged in support of the contempt application. In substance it says that the appellant did not comply with the order of 12 March 1999. There are no complaints about other types of misconduct. So it would not be in order for us to consider these extraneous matters in the present case. They must be dealt with on the other motion now pending before the High Court. That is where I think the judge went wrong. He seems to have been much moved by Mr. Anantham's argument that the appellant had moved monies despite a freeze upon them. But that, as I have earlier said, is not the essence of the charge here.

That brings me to the sentence. I ask myself the question whether the sentence passed by the learned judge accords with the justice of the case. It would do so if the effect of the sentence were to uphold the sanctity of the order of court in question and to demonstrate to other offenders the seriousness of wilful disobedience of an order of court. In my view, in all the circumstances, the justice of the case is not met by sending the appellant to prison. What is of primary importance is that the respondents have got what they wanted. A declaration of assets. No purpose is served by sending this man to prison. In my judgment the sentence passed is manifestly excessive having regard to all the facts here. Hence I came to the conclusion that a warning would suffice. The sentence was therefore set aside and a warning imposed instead. The appellant was however ordered to pay all the costs in this court. It was also ordered, with no objection being registered on the appellant's part, that his bail security of RM20,000 be escheated to the respondents towards their costs. We also ordered that there be issued a certificate for two counsel in the respondents' favour.

Denis Ong JCA:

I have read the judgments of my learned brothers Gopal Sri Ram and KC Vohrah JJCA. I agree with the reasons therein for our decision made in open court at the close of the hearing on 16 May 2001 to uphold the conviction for contempt of court, to set aside the sentence of three months' imprisonment and to warn the appellant instead. Accordingly the appeal against conviction was dismissed; the appeal against sentence allowed and the contemnor warned. We also ordered costs of two counsel to the respondent and that the deposit be paid to the respondent towards the account of taxed costs.

KC Vohrah JCA:

I have read the judgment of my learned brother Gopal Sri Ram JCA and I agree with the judgment.

As my learned brother has observed of the essence was whether the appellant did in fact disclose all his assets. He did, although he was late in filing them. It is not as if he was an obdurate contemnor who continued to defy the order to disclose his assets. In regard to sentences for contempt Lord Donalson MR observed in *Lightfoot v. Lightfoot* [1989] 1 FLR 414 at 416-417 that there are two different categories of sentences:

> Sentences for contempt really fall into two different categories. There is the purely punitive sentence where the contemnor is being punished for breach of an order which has occurred but which was a once and for all breach. A common example, of course, is a non-molestation order where the respondent does molest the petitioner and that is an offence for which he has to be punished. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category.

> There is a second category which I might describe as a coercive sentence where the contemnor has been ordered to do something and is refusing to do it. Of course, a sentence in that case also has a punitive element since he has to be punished for having failed to do so up to the moment of the court hearing, but, nevertheless, it also has a coercive element.

In our case the most appropriate punishment is the purely punitive punishment for a once for all breach. In considering what punishment to impose the court has to take into account all relevant circumstances including the nature of the contempt and mitigating circumstances which include the contemnor's good character (see eg *Danchevsky v. Danchevsky* [1975] Fam 17 and *Goff v. Goff* [1989] 1 FLR 436 CA), his health and his age. The appellant was a high Government Official before his retirement with an unblemished record. There is also the fact that he is an elderly person being 68 years of age and that he had a heart bypass surgery some ten years ago and that he makes frequent visits to his cardiologist. Foolish he was for having been recklessly sluggish but the assets were all disclosed and clearly there is contrition on his part. The court was of the view that in all the circumstances a warning coupled with a punitive order for costs to respondent with a certificate for two counsel would suffice (for the imposition of costs as penalty, see eg *R v. Border Television Ltd* and *R v. Newcastle Chronicle & Journal Ltd* [1978] 68 Cr App Rep 375 at 377).